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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL MACHADO ANDRE,

Defendant and Appellant.

E035213

(Super.Ct.No. FWV22376)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gerard S. Brown, Judge. Affirmed but sentence modification ordered.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Scott C. Taylor and Daniel Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant asserts *Blakely*<sup>1</sup> and Penal Code section 654<sup>2</sup> errors.

### FACTUAL AND PROCEDURAL BACKGROUND

At approximately 7:25 a.m. on March 17, 2001, victim was jogging around the running track at Upland High School. Defendant Michael Machado Andre approached victim from behind, slipped a light-colored cloth around her neck and said, “Come with me,” as he dragged her towards the bleachers. Victim struggled but the cloth choked her. Before victim passed out, defendant was strangling her with his hand, kicking her and striking her head against cement. She heard him say, “I’m going to kill you.”

Joggers found victim on the jogging path and contacted police. She was taken to the hospital where she remained for three days. Two years later, she continued to experience problems with her eye and numbness to the right side of her head.

The police found evidence at the track that led them to defendant. The police searched his residence and seized his jeans which were stained with victim’s blood. After defendant was arrested and waived his *Miranda*<sup>3</sup> rights, he admitted strangling victim.

An amended information charged defendant with attempted willful, deliberate, premeditated murder (§§ 664/187, subd. (a)); kidnapping (§ 207, subd. (a)), and assault with intent to commit rape (§ 220). The information alleged that he personally inflicted great bodily injury (§ 12022.7, subd. (a)) as to each of the charges.

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<sup>1</sup> *Blakely v. Washington* (2004) \_\_\_\_ U.S. \_\_\_\_ [124 S.Ct. 2531, 159 L.Ed.2d 403].

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise noted.

<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

A jury found defendant was guilty of attempted willful, deliberate, premeditated murder and of the lesser-included offense of false imprisonment by force or violence and the great bodily injury allegations were true, but he was not guilty of assault with intent to commit rape. The trial court sentenced him to life plus six years in state prison.

### DISCUSSION

Citing *Blakely v. Washington, supra*, \_\_\_\_ U.S. \_\_\_\_ [124 S.Ct. 2531, 159 L.Ed.2d 403], defendant contends the trial court deprived him of his constitutional rights to a jury trial and due process when it imposed the three-year upper term on his false imprisonment conviction. He also argues section 654 mandates a stay of the three-year upper term on his false imprisonment conviction.

The People respond defendant waived/forfeited his *Blakely* claim and *Blakely* is inapplicable, but they concede defendant's sentence for false imprisonment should be stayed pursuant to section 654.

We agree *Blakely* is inapplicable and defendant's false imprisonment sentence should be stayed pursuant to section 654.

In *People v. Wagener* (2004) 123 Cal.App.4th 424, Division One of this court held that "California's sentencing scheme is consistent with and does not offend the constitutional concerns addressed in *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466, 483 [147 L.Ed.2d 435, 120 S.Ct. 2348]] and its progeny, *Blakely*." (*Wagener*, at p. 430, fn.

omitted].)<sup>4</sup> Thus, the court held, California's sentencing scheme, unlike Washington State's that was under review in *Blakely*, does not require jury findings of aggravating factors before the defendant may be sentenced to the upper term for an offense. We adopt the reasoning and conclusion of the majority in *Wagener*. However, as indicated above, the three-year upper term sentence must be stayed pursuant to section 654.

Defendant argues the three-year upper term imposed for the false imprisonment conviction should be stayed because it was part of an indivisible course of criminal conduct. While he failed to raise the issue at the sentencing hearing, the waiver doctrine does not apply to section 654 sentencing issues. (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

Under section 654, courts are generally precluded from imposing multiple punishment where a defendant engages in a course of conduct that violates more than one statute and comprises an indivisible transaction punishable under more than one statute. (*People v. Latimer* (1993) 5 Cal.4th 1203.) The focus of this rule is whether the defendant acted pursuant to a single intent and objective. (*Id.* at p. 1208.) The resolution of this question is one of fact and the sentencing court's finding will be upheld on appeal if it is supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Williams* (1992) 9 Cal.App.4th 1465, 1473.) The California Supreme Court has

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<sup>4</sup> The question of whether *Blakely* precludes a trial court from making findings on aggravating facts supporting an upper term is currently on review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

recently indicated that appellate courts should not “parse[] the objectives too finely.”  
(*People v. Britt* (2004) 32 Cal.4th 944, 953.)

The only theory offered by the prosecution was that defendant kidnapped victim to kill her without detection. When considering consecutive sentences under California Rules of Court, rule 4.425, the sentencing court stated it did “not find that the crimes and their objectives were predominantly independent of each other, or that the crimes did involve separate acts of violence or threats of violence.” The evidence supports the court’s finding. Thus, as the People concede, the three-year upper term should be stayed pursuant to section 654. (§ 654; *People v. Latimer, supra*, 5 Cal.4th at p. 1208.)

#### DISPOSITION

The judgment is modified pursuant to section 654 to stay the three-year upper term imposed on the false imprisonment conviction. In all other respects, the judgment is affirmed. The trial court is directed to amend the abstract of judgment and its minute order so as to reflect these modifications and to forward a certified copy of the amended abstract of judgment to the Director of the Department of Corrections. (§§ 1213, 1216.)

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HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

KING

J.